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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 10

UNITED STATES OF AMERICA, EX REL. WILLIAM H. GIESE,

Petitioner,

vs.

LIEUTENANT GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

In order to maintain some semblance of continuity, despite the transposition in the brief for the respondents of the order of our points, we shall reply to said brief under the point headings used in our original petition (and supporting brief) which stands as our opening brief on the merits.

Furthermore, in order to avoid confusion and to keep the length of this reply to a minimum, we shall ignore the respondents' "Summary of Argument" (pp. 6-11) and reply only to the main "argument" which it purports to summarize.

THE QUESTIONS PRESENTED.

The respondents (p. 2) say that the **second** "question presented" is

> "Whether an honorable discharge for the period for which petitioner had been drafted releases him from liability for desertion from a former enlistment which had not expired, which he did not reveal at the time he was drafted and which was not known at the time of the discharge."

The wording of this "question" involves one of the oldest tricks in the bag, viz.: the so-called "non-evident major premise" fallacy, in which the proponent of a proposition blandly *assumes*, at the outset, the very matters to be proved and then, having done so, coasts easily to his conclusion. In the case at bar, the very matters to be proved by the respondents, which they attempt to *assume* by the wording of the said "question", are:

1. That the petitioner's honorable discharge in 1946 "from the military service of the United States" "for the convenience of the Government" under "RR1-1" (the so-called "Point System") was, in fact or in law, merely "a discharge for the period for which petitioner had been drafted";
2. That the petitioner's earlier enlistment "had not expired";
3. That "he did not reveal" his earlier enlistment "at the time he was drafted"; and
4. That such facts were "not known at the time of his discharge".

We respectfully submit that the *real* "questions presented" are as set forth in paragraphs 1 and 2 on pages 2-3 of our original petition.

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STATEMENT.

The respondents' statement (p. 3) that the petitioner, at the time of his draft induction on March 16, 1944, "did not reveal his former enlistment and desertion (R. 7, 8)", while alleged in the respondents' answer (R. 8), was not established by proof. The respondents' further statement (p. 3) that, in 1948, the Criminal Investigation Division of the Army, "through its fingerprint department, discovered that petitioner was the person who had deserted in 1943 (R. 7, 15)" is neither alleged in the respondents' answer (R. 6-9) nor established by any proof other than argument by the respondents' counsel (R. 15). Nor, the petitioner having been inducted under the same name, William H. Giese, and, despite the Army's having had the same fingerprints on file from the time of his induction in March of 1944 until his honorable discharge in June of 1946, no explanation is offered by the respondents why it took the Army until late in 1948 to ascertain that he was the same individual. The respondents' description of the form of the Petitioner's honorable discharge of June 29, 1946 fails to note that it also stated that it was issued for the "CONV OF GOVT RR 1-1 (DEMOBILIZATION) AR 615-365 & AG 210.8 ALFSI 12 JUN 46 SERVICE" and that he had "ASR SCORE (2 SEP 45) 44" (R. 39). Respondents' further statement (p. 6) that,—despite General Chamberlin's previous "approval" of the petitioner's sentence (as reduced and mitigated by him), despite the Board of Review's "holding" that the record is "legally sufficient to support * * * the sentence" and despite the Judge Advocate General's order giving General Chamberlin merely "authority to order the execution of the sentence",—"Under AW51, (a) * * * General Chamberlin has the power to mitigate, remit or suspend the whole or any part of the sentence", is, we contend, *not* a correct statement of the effect of the said Article of War.

ARGUMENT.

I.

THE ISSUANCE, DURING THE GENERAL DEMOBILIZATION IN 1946, OF A DISCHARGE, "FOR THE CONVENIENCE OF THE GOVERNMENT", UNDER "R R 1-1" (THE POINT SYSTEM) CERTIFYING THAT THIS PETITIONER WAS THEREBY "HONORABLY DISCHARGED FROM THE MILITARY SERVICE OF THE UNITED STATES", DISCHARGED HIM FROM ALL SUBSISTING ENLISTMENTS AND INDUCTIONS AND MADE HIM A CIVILIAN, NO LONGER SUBJECT TO TRIAL BY COURT-MARTIAL FOR DESERTION OR ANY OTHER OFFENSE NOT SPECIFIED UNDER ARTICLE OF WAR 94.

As is pointed out in our petition for certiorari (pp. 14-28), all Judge Advocates General of the Army and Navy, at least five Attorneys General of the United States, innumerable District Courts and Courts of Appeal and this Court have uniformly held that an individual once separated from the service thereupon ceases to be amenable to military or naval jurisdiction and cannot thereafter be tried by court-martial except for certain offenses specified under Article of War 94 or the comparable Article 14 of the Articles for the Government of the Navy, both of which relate only to pecuniary frauds against the Government and are not charged here.

The respondents concede this to be the general rule but contend (pp. 23-36):

> **"that petitioner's honorable discharge covered no more than it purported to cover, i. e., petitioner's serv-**

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ice from March 16, 1944, to June 29, 1946. The honorable discharge, therefore, did not condone petitioner's desertion in 1943 from his prior enlistment or preclude his trial by court-martial for such desertion."

Under this heading, the respondents argue **first** (pp. 24-26) that the

"petitioner's 1930 enlistment was still in effect at the time of his trial before the court-martial unless the 1946 discharge acted as a release of it."

While it is quite true, as respondents say at page 24, that "AW 107 * * * provides that a deserter, before being discharged from his enlistment, is *liable* to serve, after his return to a full duty status, the balance of his *enlistment term* remaining unserved at the time of his desertion" (emphasis ours),

the *conclusions* which the respondents attempt to draw therefrom are not only not supported by the wording of the said Article of War 107 but exhibit a decided ignorance or disregard of well established Army law and regulations. The *key* words are

"*liable* to serve"

and

"*enlistment* period".

The respondents' repeated assertions that this article (p. 28)

"*prohibited* the discharge of petitioner" (emphasis ours);

made (p. 31)

"*mandatory* the serving of time lost in desertion" (emphasis ours);

and that (p. 25)

"Because of his desertions, his obligation to serve had not been discharged at the time of his apprehension in 1949,"

are not supported by any authority whatsoever and are flatly contrary to the well settled Army rule for generations that this "*liability*" to serve out "bad time" *can* be *waived* and *is waived* by a *discharge* from the service without requiring that such time be served out prior to such discharge.[1]

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1. In Op., JAG, 1880 (referring to then AW 48, which later became AW 107 and, in pertinent part, then provided that "every soldier who deserts the service of the United States shall be *liable* to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment") (emphasis ours), it is said that, p. 22:

"4. The enforcement of the *liability*, where enforced at all, is generally postponed till after the execution of the punishment (if any), imposed upon the deserter by his sentence. A deserter *may* still be required to make good the time included in his unauthorized absence from the service, although his *term of enlistment* has expired pending a term of confinement adjudged him by court martial on conviction of his offence, *provided he has not been discharged*. XXXII, 40.

"5. The United States may *waive* the liability imposed by the first clause of the Article. *It is in fact waived* where the deserter, without being required to perform the service, is *discharged* by one of the officials authorized by Art. 4 to discharge soldiers. So it is *waived* where the soldier is adjudged to be dishonorably discharged by sentence of court martial, and this punishment is duly approved and thereupon executed. XXIX, 507; XXX, 506; XXXVII, 416.

"6. The provision of the *second* clause of this Article applies only to desertions committed while the soldier is duly in the service and before his *term of enlistment* has expired. For an escape from military custody, committed *after* the expiration of *the period for which he enlisted*, and while he is held in arrest prior to trial or awaiting sentence, or in confinement under sentence,—a soldier cannot be made amenable, under this Article, to trial as for a desertion. XXXIV, 98. A deserter, who has been duly *discharged* from the service, of course does *not* remain amenable to trial under this Article. XXXI, 48."

In Dig. Op., JAG, 1912, it is said (emphasis ours), p. 130:

"**XLVIII B.** The United States may *waive* the liability imposed by the first clause of the article. *It is in fact waived* where the deserter, without being required to perform the service, is *discharged* by one of the officials authorized by Article 4 to discharge soldiers. So *it is waived* where the soldier is adjudged to be dishonorably discharged by sentence

The respondents' further assertions (pp. 9, 24, 25) that the petitioner's "enlistment" was, by the Extension of Service Act, extended to January of 1948, and inferring that his "bad time" must, under said AW 107, be made up

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of court-martial, and this punishment is duly approved and thereupon executed. R. 29, 507, Dec., 1869; 30, 506, July, 1870; 37, 416, Mar., 1876. Nor does a deserter who has been duly discharged from the service remain amenable to trial under the last clause of this article. R. 31, 48, Nov., 1870."

p. 611:

"**I B 2 b (1).** After a soldier had served three years he was discharged per expiration of term of enlistment. He *could have been held* to make good time lost, but this was not done, due to neglect on the part of the company clerk and the first sergeant. *Held*, that the discharge was for the convenience of the Government and that the soldier was entitled to have the enlistment recorded as a complete enlistment under the provisions of the act of May 11, 1908 (35 Stat. 109). C. 18438, Sept. 19, 1911."

In Dig. Op., JAG, 1912-40, it is said (emphasis ours), pp. 375-377:

"**465 (A.W. 107). SOLDIERS TO MAKE GOOD TIME LOST.** Sec. 1, Ch. II, act of June 4, 1920 (41 Stat. 809); 10 U.S.C. 1579.

* * *

"The fact that the statute of limitations is successfully pleaded in bar of trial for desertion does not operate to release the soldier from his military status, in the absence of a discharge. *Under A.W. 107*, regardless of the extent of his absence from duty, *the Government has the right to require further service* in a full-duty status sufficient to make up the terms of his *original enlistment, provided only the soldier has not been separated from the service either by operation of law or under A.W. 108.* 342.02, July 10, 1928.

* * *

"**(6) WAIVER BY GOVERNMENT.** The *liability* imposed on the soldier by A.W. 107 *may be waived* by the Government, and *it will be so waived when the soldier is discharged by competent authority without being required to make up time lost.* 220.89, Oct. 5, 1927.

"The *liability* to retention in the service imposed by A.W. 107 may be *waived* by the Government, and if it is desired to relieve a soldier from the consequences of this article, such may be accomplished by action of the Secretary of War in excusing the absence. If at the expiration of his regular term of enlistment a soldier should be discharged by proper author-

after that date, also demonstrates an ignorance or disregard of Army regulations to the contrary.[2]

In an attempt to answer our earlier contention (p. 6 of Petitioner's Reply to Respondent's Memorandum), that giving the petitioner credit for all *honorable* service (good time) performed by him between March 16, 1930, when he enlisted, and June 29, 1946, when he was honorably discharged, he had actually served out his three-year 1930 enlistment in full on the date of his discharge "from the military service of the United States," the respondents (pp. 25-26) say that:

> "The time lost from this enlistment was not made up by the 1944-1946 military service since an *enlistment* by a soldier already subject to an existing enlistment 'without having first received a regular discharge' is defined in A W 28 • • • as a desertion and the soldier is deemed to have *enlisted* 'fraudulently'."

This contention by the respondents ignores (1) the clear-cut distinction in Army law and regulations between an "*enlistment*", which is voluntary and establishes a "contract," and a draft "*induction*," which is *involuntary*;

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ity the right to retain time in the service will be considered as *waived*. 290.414, Misc. 55, • • 10.

"On the question as to the authority of the Secretary of War to reopen a case where time lost by an enlisted man had been held due to misconduct and it later appeared that the diagnosis on which the holding was based was erroneous, *Held*, That AR 345-415, so far as it relates to making good time lost under A.W. 107, is a regulation for administrative convenience, and is subject to *waiver* by the Secretary of War so far as concerns the finality of any conclusion thereunder. *Held further*, That while A.W. 107 makes the soldier *liable* to serve out time lost, such *liability may be waived* by the Government. 220.7191, Sept. 6, 1930."

2. AR 615-360, 25 May 1944, "Enlisted Men, Discharge; Release from Active Duty," provides (in *1, d,* (2)) that

"(2) The provisions of the one hundred and seventh article of war do *not* apply where the term of service has been extended by operation of law" (emphasis ours).

and (2) the well-settled Army rule that service, even under a "fraudulent *enlistment*" (which this was *not*) is *valid* service *unless* the soldier is actually *discharged* from the service for "fraudulent *enlistment*," which was *not* done here.

A W 28 (10 U. S. C. 1499), upon which respondents rely in urging said contention, provides that:

> "Any soldier who, without having first received a regular discharge, against *enlists* in the Army, • • • shall be deemed to have deserted the service of the United States; and where the *enlistment* is in one of the forces of the United States mentioned above, to have fraudulently *enlisted* therein." (Emphasis ours.)

A W 54 (10 U. S. C. 1526), which must be considered in conjunction with A W 28, provides that:

> "**Art. 54. Fraudulent enlistment.**—Any person *who shall procure himself to be enlisted* in the military service of the United States by means of wilful misrepresentations or concealment as to his qualifications for *enlistment*, and shall receive pay and allowances under such enlistment, shall be punished as a court-martial may direct." (Emphasis ours.)

It should be noted that these articles speak only of "*enlistment*", and do *not* mention "*induction*". While the rather loose term "enlisted men" includes *both* those who voluntarily "enlist" and those who are involuntarily "inducted"[3], those who have voluntarily "*enlisted*" and those who have involuntarily been "*inducted*" are treated very *differently* in Army laws and regulations.[4]

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3. AR 615-360, 25 May 1944, "Enlisted Men, Discharge from Active Duty," provides in *1, b*, that (emphasis ours):
"The term 'enlisted men' as used herein includes all persons *enlisted or inducted* in any component of the Army of the United States in active Federal Service."

4. In Dig. Op., JAG, 1912, it is said (emphasis ours), p. 603:
"I A 1. The act of June 20, 1890 (26 Stat., 163), directed the mustering out of the enlisted men of the artillery detach-

Historically, this sharp distinction, between those who voluntarily "*enlist*" and those who are involuntarily "*inducted*" under the draft, is based in large part upon the

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ment at West Point and their immediate *reenlistment* as Army service men in the Quartermaster's Department. *Held*, that it does not authorize their being forced into a new *contract* or *reenlisted against their will, as this enlistment, like all others, is voluntary*. P. 41, 460, July, 1890."

p. 605:

"**I** A 9 a. A fraudulent *enlistment* is an *enlistment procured* by means of a willful misrepresentation in regard to a qualification or disqualification for *enlistment*, or by an intentional concealment of a disqualification, which misrepresentation or concealment has had the effect of causing the *enlistment* of a man not qualified to be a soldier and who, but for such false representation or concealment, would have been rejected. P. 56, 219; 63, 153; C. 17919, Apr. 28, 1905; 24912, May 10, 1909."

In Op., JAG, 1918, Vol. 2, it is said (emphasis ours), p. 178:

"**ENLISTMENT: When Oath of Enlistment is Necessary.**

"It is *unnecessary* to administer an oath to enlisted men brought into the service by *draft*. The one hundred and ninth article of war does *not* apply to them. With respect to men *voluntarily enlisted*, or to officers, *the oath is a statutory requirement*, and can not be waived or modified by the War Department."

AR 615-360, 25 May 1944, "Enlisted Men; Release from Active Duty," provides (emphasis ours):

"**47. Form of discharge certificate to be given.**—**a.** An enlisted man *who procured his entry into the Army through enlistment and who is to be discharged for the commission of a fraud* as discussed in paragraphs 43 and 44 will be given a discharge from the Army of the United States (blue). The reason for the discharge will be stated on the Certificate.

"**b.** Similarly a blue discharge will be given to those *enlisted men who were inducted into the service* due to misrepresentation with intent to deceive. No final statement or final payment roll will be furnished on an enlisted man when he is discharged under the provisions of this section and has no deposits due him but in lieu thereof, a full statement in writing will be furnished him stating the reasons for not submitting a final statement or final payment roll. See AR 345-475."

AR 615-190, 24 October 1950, "Enlisted Personnel; Service Requirements of the Selective Service Act of 1948," provides (emphasis ours):

"**6. Enlistment in the Regular Army or Air Force.**—**a.** For

fact that, in time of peace, an enlisted man, who voluntarily "reenlisted", received, under certain conditions, an "enlistment allowance"; and he could, by paying certain sums, which varied depending on the length of his unserved enlistment period, "purchase" his discharge from the Army.[5]

Hence an "*inductee*" *cannot* be guilty of "fraudulent *enlistment.*"

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discharge of *inductees* from the Army of the United States or Air Force of the United States *to enlist* in the Regular Army or Air Force, see AR 615-365 and AFR 39-14."

AR 615-375, 14 June 1950, "Enlisted Personnel, Discharge Certificates," provides (emphasis ours):

"**2. Certificate of discharge.**—**a.** Each enlisted person lawfully *enlisted, inducted, or ordered into active military service from a civilian* component, shall, upon separation from said service, be given a certificate of discharge by the commanding officer or designated officer of the installation effecting such separation, * * *."

5. AR 615-360, 26 Nov. 1942, "Enlisted Men, Discharge, Release from Action Duty," provided:

"**19. Authority.** That in time of peace the President may, in his discretion and under such rules and upon such conditions as he shall prescribe, permit an enlisted man to purchase his discharge from the Army. The purchase money to be paid under this section shall be paid to a finance officer of the Army and deposited in the Treasury to the credit of one or more of the current appropriations for the support of the Army, to be indicated by the Secretary of War, and may be available for the payment of expenses incurred during the fiscal year in which the discharge is made. See sec. 4, act June 16, 1890, 126 Stat. 158; 10 U.S.C., 651; M.L., 1939, sec. 232.

* * *

"24. Purchase price.— * * *

* * *

"c. **To be increased by amount of enlistment allowance; when required.**—In the case of an enlisted man who has received during his current enlistment the enlistment allowance of $50 or $25 multiplied by the number of years served in the enlistment period from which he was last discharged, authorized by section 9, act of June 10, 1922 (42 Stat. 629), and who purchases his discharge before he has completed 1 year of service (exclusive of time to be made good under the one hundred and seventh article of war) in the current enlistment, the price of purchase prescribed in *a* above will be increased by the amount of such enlistment allowance."

In the **second** place, it is also well established in Army law that, although service under a "fraudulent *enlistment*" (which this is *not*) does *not bar trial* for a *prior* desertion and, under AW 28 actually furnishes "*prima facie* evidence" of the prior desertion,[6] such service nevertheless is *not* in itself a "*desertion*" and is "*valid*" service and is recorded and counted such.[7]

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6. In Op., JAG, 1880, it is said (emphasis ours), pp. 23-24:

"1. *This Article*, in its first clause, *does not create* a specific offence, or *one distinct from the desertion made punishable in the 47th Article*, but declares in effect that a soldier who abandons his regiment shall be deemed none the less a deserter although he may forthwith reenlist in a new regiment. *It does not render the act of reenlistment a desertion, but simply makes the reenlistment*, under the circumstances indicated, *prima facie evidence of a desertion from the previous enlistment* from which the soldier has not been discharged, *or, more accurately, evidence of an intent not to return to the same.* The object of the provision, as it originally appears in the British code, apparently was to preclude the notion, that might otherwise have been entertained, that a soldier would be excused from repudiating or departing from his original contract of enlistment, provided he presently renewed his obligation in a different portion of the military force. XLII, 642."

7. In Op., JAG, 1880, it is said (emphasis ours), p. 224, that:

"5. *Held* to be no defense to a charge of desertion that the accused, at the time of the enlistment which he is charged with having abandoned, was an unapprehended deserter from the army; *an enlistment of a deserter being not void but voidable only.* XXXIV, 499, 623. (See Enlistment § 3.)" pp. 437-438:

"3. Secs. 1116-1118, Rev. Sts., providing that deserters, convicted felons, insane or intoxicated persons, and certain minors, shall not be enlisted, &c., are regarded as *directory only*, and *not* as necessarily making *void* such enlistments but as rendering them *voidable merely*, at the option of the government. In cases of such enlistments, except of course where the party, by reason of mental derangement or drunkenness, was without the legal capacity to contract, the government may elect to hold the soldier to service, subject to any application for discharge which may be addressed by himself or his parent, &c., either to the Secretary of War or to a United States court. XXXI, 342, 595; XLIII, 167. (See Third Article § 1.)

"A deserter who enlists and afterwards again deserts *cannot*,

The respondents' concluding assertion under this subpoint (p. 26) that (emphasis ours)

> "Moreover, the language of AW 107 that 'every soldier who in an existing or subsequent enlistment deserts * * * shall be *liable* to serve, after his return to a full duty status, for such period as shall, with the

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on being brought to trial for the second offence, *defend* on the ground that his enlistment was *void* and that he is not therefore amenable to trial. A plea of defence to this effect should not be sustained by the court. XXXII, 506."

In Dig. Op., JAG, 1912, it is said (emphasis ours), p. 606:

"I A 9 f. A soldier was mustered into the service and later dishonorably discharged by sentence of a court-martial. He subsequently reenlisted in another regiment and served therein until mustered out. *Held*, that if one who is physically and mentally capable of rendering service as a private soldier is employed as a soldier and renders that service, he is a soldier even though there may be a law forbidding his enlistment in positive terms, unless that law declares him wholly incapable of making a contract of enlistment (so that any such contract entered into with him would be absolutely void). *The law* that merely provides that he shall not be enlisted would be violated by enlisting him, but that *could not alter the fact that he had been enlisted and had become a soldier and had performed service. If*, therefore, *men are enlisted* by a recruiting officer, through his own or their own willful disregard of the provisions of the law, or *through their fraud or deception*, or the recruiting officer's ignorance of the facts, *the contract is simply voidable, and has the same force and effect as the enlistment of any person until duly voided by the Government.* P. 48, 366, Aug., 1891; 55, 183, Aug., 1892; C. 4797, Aug. 15, 1898; 6398, May 11, 1899.

"I A 9 f (1). *Held* that the *fraudulent enlistment* of a soldier who had been discharged without honor *was not void* but that the Secretary of War may cause him to be tried for the fraudulent enlistment, or to be summarily discharged therefrom without honor, or to be restored to duty. C. 4077, Apr. 28, 1898.

"I A 9 f (2). *Held* that the *fraudulent enlistment* of a soldier who had been dishonorably discharged for desertion *was not void*. P. 48, 366; C. 321, Sept. 12, 1894; 359, Sept. 19, 1894; 494, Oct. 15, 1894; 1429, June 3, 1895; 1571, July 19, 1895; 1624, Aug. 6, 1895; 2115, Mar. 9, 1896; 2717, Oct. 30, 1896; 4711, July 30, 1898; 5592, Dec. 29, 1898."

p. 607:

"I A 9 f (3). *Held* that the *fraudulent enlistment* of an

time he may have served prior to such desertion • • • amount to the full term of that period' *would preclude crediting the 1944-1946 service* to the prior enlistment",

is simply *not true*, as has previously been demonstrated.

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escaped general prisoner was *not void, and in a particular case that his record after such enlistment warranted the remission of the unexecuted portion of his sentence, and the continuation of his enlistment.* C. 9099, Oct. 10, 1900.

"I A 9 f (4). *Held* that the *fraudulent enlistment* of a discharged general prisoner was *not void*, and that the soldier may be tried for the offense, discharged without honor, or restored to duty. C. 5481, Dec. 9, 1898.

"I A 9 f (5). *Held* that sections, 1116-1118, R.S., which provide that deserters, convicted felons, insane and intoxicated persons and certain minors shall not be enlisted, etc., are *directory only, and do not necessarily make void such enlistments*, but render them *voidable merely* at the option of the Government. P. 42, 82, July, 1890; 48, 367, Aug., 1891; C. 9490, Dec. 27, 1900, and Oct. 3, 1911; 17807, Apr. 10, 1905; 27507, Nov. 19, 1910; 27711, Jan. 17, 1911."

p. 608:

"I A 9 f (8): *An enlistment in violation of article 50 is not void, but voidable* at the option of the United States *only. Until so avoided service under it is valid service.* P. 43, 48, Sept., 1890; 53, 254, Apr., 1892; C. 321, 355 and 359, Sept., 1894; 494, Oct., 1894; 538, Oct. 22, 1894; 902, Feb., 1895; 1429, June, 1895; 1571, July, 1895; 1624, Aug., 1895; 2022, Jan., 1896; 2115, Mar., 1896; 2269, May, 1896; 2717, Oct. 30, 1896; 18492, Aug. 31, 1905. On a trial for an offense committed during such enlistment, a plea by the accused, in bar of trial, that this enlistment being fraudulent on his part, is void, should not be sustained. P. 39, 257, Mar., 1890; C. 23644, Mar. 2, 1909."

pp. 609-610:

"I A 9 l. There is distinction between a fraudulent contract of enlistment and the character of service thereunder. While the former is voidable at the option of the Government, *the service is legal service and, if the contract be not avoided on account of the fraud, the soldier would be entitled to such a discharge upon completion of his term as his services may merit. Held* that if the discharge is an honorable one, it should in general be viewed as establishing the fact that the service referred to therein was honest and faithful. C. 355, Sept. 18, 1894; 2022, Jan. 27, 1896; 2269, May 6, 1896; 6406, May, 1899.

"I A 9 m. *Held* that *time actually served under a fraudu-*

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Furthermore, the respondents' passing remark (p. 26) that

> "And see Army Regulations 615-360, (*infra*, note 15, p. 28,"

insofar as it implies that said regulation supports their said contention, is *not* correct and it is *not* supported by said or any other Army regulation, as even a cursory examination of said regulation will demonstrate.

It is therefore submitted that, as we said in our original petition (p. 6), giving the petitioner credit for all *honorable* service ("good time") performed by him between March 16, 1930 (when he enlisted, R. 2, 7) and July 2, 1930 (when he went A. W. O. L., R. 3, 7); between October 13, 1942 (when he was "restored" to duty, R. 7) and March 15, 1943 (when he again went A. W. O. L., R. 7); and between March 16, 1944 (when he was inducted, R. 3, 7) and June 29, 1946 (when he was honorably discharged, R. 3, 7); (viz:

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lent enlistment should be counted in computing the 30 years necessary to entitle the soldier to retirement under the provisions of the act of September 30, 1890 (26 Stat. 504). C. 355, Sept., 1894; 2022, Jan., 1896; 7108, Oct., 1899.

"I A 9 n. *Held* that the award of a certificate of merit to a soldier who was serving under a fraudulent enlistment was lawful, and that upon being restored to duty without trial he was entitled to the additional pay which is authorized by the statutes. C. 16644, July 27, 1904.

"I A 9 o. *Held* that *service under a fraudulent enlistment counts toward continuous service, unless the enlistment is voided as fraudulent by the Government.* C. 2269, May 6, 1896; 16644, July 27, 1904; 22333, Nov. 9, 1907."

pp. 999-1000:

"II A 1 d. *Held, that time actually served in a fraudulent enlistment* without a discharge from a previous enlistment *counts* for retirement. C. 355, Sept. 1894; 2022, Jan., 1896; 3777, Oct. 21, 1899; 7108, Oct., 1899."

In Op., JAG, 1918, Vol. 2, it is said (emphasis ours), p. 438:

"*2.* This office has repeatedly held that *a fraudulent enlistment is not void* but voidable at the option of the Government only, *and until so voided, service under it is valid* (Dig. Ops. JAG 1912, pp. 608, 609) • • •."

respectively, 3 months, 16 days; 5 months, 2 days; and 2 years, 3 months, 13 days; or a total of exactly 3 years), **he had actually served his three year** (1930) **enlistment in full and**, had there intervened no war "emergency", **would have been discharged in due course on the same day** (June 29, 1946) **on which he was actually discharged.**

The respondents' **second** main contention (under our Point I and their Point II) is (pp. 27-36) that:

> "**The 1946 honorable discharge did not release petitioner from his 1930 enlistment nor relieve him of liability for violations occurring during that enlistment.**"

Under this contention, the respondents begin by saying (p. 27) that:

> "The *only* statute dealing with discharges from the military service in AW 108. • • • This article prohibits a discharge before expiration of term of service except by order of certain officers or by sentence of a general court-martial. It has been held that no discharge may be given a soldier except as authorized by AW 108. • • •." (Emphasis ours.)

While it is quite *true* (*despite* respondents' own contradictory and unsound contention (pp. 9, 10, 25, 26, 28) that AW's 28 and 107 *also* affect the issuance and validity of discharges from the service) that

> "The *only* statute dealing with discharges from the military service is AW 108",

and while the other limited statements above quoted are also quite correct, the ~~petitioner's~~ RESPONDENTS' further conclusion (p. 28) that (emphasis ours):

> "The *combined* effect of Articles *28*, *107* and 108 accordingly *prohibited* the discharge of petitioner from the earlier enlistment from which he deserted, in the

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> absence of a *special* order as provided in AW 108. *Cf. In re Markun,* 232 Fed. 1018 (E. D., Pa.). No. *such* order authorized petitioner's discharge,"

is *not* at all correct and is extremely misleading.

As we have heretofore demonstrated at length (*ante,* pp. 5-8), AW 107 merely makes a deserter *liable* to make up "bad time" but it is well established in Army law that such *"liability" can be* and *is waived* by the issuance of a discharge under AW 108.

Furthermore, as we have heretofore demonstrated (*ante,* pp. 7-8), the petitioner's "term of enlistment" was *not,* insofar as AW 107 is concerned, *extended* by the Extension of Service Act; as we have previously demonstrated (*ante,* pp. 8-15), the petitioner was *not* guilty of a "fraudulent *enlistment*" and, even if he were, his actual service thereunder, in the absence of a discharge on that specific ground, is *valid* service and counts as such; and, as we have previously demonstrated (*ante,* pp. 15-16), giving the petitioner credit only for his "good" time, he had actually served out his 1930 3-year enlistment in full on the date of his 1946 honorable discharge.

Insofar as the respondents' said quoted statement (p. 28) says (emphasis ours) that AW 108

> "accordingly *prohibited* the discharge of petitioner from the earlier enlistment from which he deserted in the absence of a *special* order as provided in AW 108. *Cf. In re Markun,* 232 Fed. 1018 (E. D., Pa.). *No such* order authorized petitioner's discharge,"

it is not only inaccurate and contrary to Army law and regulations but is decidedly misleading.

In the **first** place, AW 108 has *no* requirement of a *"special"* order as respondents' counsel state. Said ar-

ticle says *only* (1) that "no enlisted man, • • • shall be discharged from said service"

> "without a certificate of discharge, signed by a field officer • • •,"

which was fully complied with in the case at bar (R. 39); and (2) that "no enlisted man shall be discharged from said service" (emphasis ours)

> "before his term of service has expired, *except by order of the President, the Secretary of War*, the commanding officer of a department, or by sentence of a general court-martial."

As above demonstrated, *no "special"* or *individual* order is required, either by said Article or in any other article or regulation and *all* that is required, to discharge a man "before his term of service had expired" is an

> "order of the President, (or) the Secretary of War."

The *only* case (*In re Markun*, 232 Fed. 1018) cited by respondents for their said contention does *not* support them. In the cited case there was *no* "certificate of discharge" (the soldier had only a "furlough"); it was signed only by a 1st Lieutenant who is *not* a "field officer" (Major and higher), and no order of the President or the Secretary of War authorized it.

It should also be noted at this point that even under the Extension of Service Act of December 13, 1941 (50 U. S. C., App. 732), relied upon by the respondents to extend the petitioner's "period of service" to January of 1948, it is expressly provided

> "That nothing in this section shall be construed to prevent the President from terminating such periods of service • • • at an earlier date in any case."

It is well settled in Army law that, with certain minor exceptions not here pertinent, the acts of the Secretary of

War and all Army regulations promulgated by him are, in law, the acts of the President as the chief executive of the nation, whether purporting to be his acts or not.[8]

8. In Op., JAG, 1880, it is said (emphasis ours), p. 117:

"That *regulations promulgated through the Secretary of War are* to be 'received as *the acts of the Executive*,'—see *United States* v. *Eliason*, 16 Peters, 301; *United States* v. *Webster*, Daveis, 59; *United States* v. *Freeman*, 1 Wood. & Minot. 50-1; *Lockington's* Case, Brightly, 288; *McCall's* Case, 5 Philad. 289; *In matter of Spangler*, 11 Mich. 322;—in connection with other authorities noted under SECRETARY OF WAR."

p. 240:

"3. A summary dismissal '*by order of the Secretary of War*,' *is in law the act of the President*. V, 319, XLI, 611. (See SECRETARY OF WAR.)"

pp. 444-445:

"SECRETARY OF WAR.

"It is a fundamental general principle of our public law that all acts done by and directions emanating from the heads of the executive departments in the course of their administrative duties, are in law the acts and directions of the President, in whom is reposed by the Constitution the entire executive power of the government, and whom the heads of departments (except where specially invested by Congress with distinctive authority of their own) simply act for and represent. Thus *all orders made and issued by the Secretary of War in connection with the government and regulation of the military establishment*,—such as orders convening general courts-martial, or approving and directing the execution of the sentences or otherwise acting upon the proceedings of such courts, or mitigating or wholly or partially remitting punishments imposed thereby; or orders summarily dismissing officers, or dropping for desertion, retiring or accepting the resignation of, officers; or orders establishing military reservations, or *promulgating army regulations*, &c.,—*are* to be regarded as *the orders and acts of the President*, whom the Secretary of War represents in the administration of his department; the same being presumed to be made and issued with the knowledge and by the direction of the President, *whether or not he be referred to therein* as having directed or commanded the same; and being equally as valid and operative as if signed by the hand of the President himself. V, 319; IX, 44; XXIII, 654; XXXVII, 650; XXXVIII, 107, 243; XXXIX, 296; XLI, 25, 611; XLII, 209; XLIII, 106."

Later on in their own brief, the respondents themselves point out (p. 34) that (emphasis ours):

> "During the fiscal year 1946 *over 7,500,000 persons were separated from the Army.* * * * *These persons were separated before their terms of service were completed.* See Extension of Service Act. *Authority to order their discharge was granted to separation center commanders* by paragraph 13a of War Department Circular 188, dated June 23, 1945 (see AW 108). At the time of petitioner's discharge there were 21 separation centers in the United States. (Change No. 1 to Appendix 1, War Department Readjustment Regulations, 1-2, January 31, 1946.) Much of the processing for separation of overseas troops was completed before their return to the states (see par. 4, RR1-1, March 18, 1946). * * *" (Under which latter regulation the petitioner in the case at bar was actually discharged. For text of latter regulation, see pp. 3-4 of our earlier "Reply to Respondents' Memorandum.")

It should be noted that said discharge procedures made *no* distinctions whatsoever between those who had *voluntarily "enlisted"* (or had accepted commissions) and those who had *involuntarily* been *"inducted"* ("drafted") into the service and, on the contrary, applied to

"*All* military personnel"

and to

"individual officers and enlisted personnel"

In Dig. Op., JAG, 1912, at pp. 69-70, the entire statement last above quoted is again set forth without change; and the following is also said, p. 1044:

> "**IV** A 1. *An order issued by the War Department directing the muster out of volunteer troops must be regarded as promulgated by authority,* since it can be issued only by authority of the Secretary of War. *Held,* that *such order is a regulation* with reference to the administration of the Army *which the President has the constitutional authority to make, and, as such, it has the force of law.* R. 5, p. 319, Nov. 19, 1863; C. 6980 and 8962, Sept., 1900."

alike and provided for the discharge of all who had "enlisted" or had been "inducted" *except*

> "*those who volunteer for retention on duty* or whose retention is *specifically* authorized by War Department directives." (Emphasis added.)

As this Court probably also recalls, the War Department, from time to time during the years 1945-1946, announced certain

> "critical ASR scores"

which varied with the different ranks and grades and became progressively *lower* as time went on, thus resulting in the gradual and fairly orderly demobilization of the Army.

It should also be noted that, in and by said RR 1-1 the authority of the President and of the Secretary of War to discharge any and

> "*all* military personnel"

was delegated down to those commanders who actually carried out the "demobilization" in the field, they being directed that

> "these regulations will be cited as authority for separation."

These considerations demonstrate fully the *unsoundness* of the respondents' said contention (p. 28) that the petitioner could *not* have been discharged

> "in the absence of a *special* order as provided in AW 108";

and that

> "No such order authorized petitioner's discharge,"

because, were the respondents' said contention to be adopted, *the United States* Government would have been *without power*, after V-J day, *to reduce the size of its armed forces* and would therefore have been *required to*

keep under arms all of its millions of soldiers because *all* persons who so served, whether by

"enlistment," "extension of service" or "induction"

were on active duty under substantially the same provisions respecting the *duration* of their service.

Furthermore, it is also well settled in Army law—

(1) That an honorable discharge, even from a "fraudulent enlistment" (which this was *not*), *cannot* be revoked;[9] (2) That such a discharge *cannot* be revoked, even where issued by mistake;[10] and (3) that such a discharge *cannot* be revoked, even thought the offenses with which he is charged were *not* known at the time of such discharge.[11]

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9. In Dig. Op., JAG, 1912, it is said (emphasis ours), p. 455:
"**XV** A 2. An officer secured a commission in the volunteer service *by fraud* and was honorably discharged when his regiment was mustered out. Later, a War Department order was issued which purported to dishonorably discharge him as of the date of his muster out on account of certain irregularities. *Held* that *the order which purported to change the honorable discharge* to a dishonorable one *was inoperative.* C. 9121, Oct. 13, 1900, and Aug. 17, 1906."

even where issued by mistake;[10] and (3) That such a

10. In Dig. Op., JAG, 1912, it is said (emphasis added), pp. 456-457:

"**XV** D 1 a. A soldier was duly discharged pursuant to an order from the War Department. *The order was issued under a misapprehension* in regard to his actual status at the time—*a mistake of fact*—which if discovered would have deferred or prevented the issuing of the order. *Held* that *the mistake of fact did not invalidate the discharge;* that having been duly executed, *it could not be revoked.* P. 61, 421, Sept., 1893; C. 1876, Nov., 1895; 1791, Jan. 2, 1896; 11741, Dec. 11, 1901, and Jan. 20, 1902.

"**XV** D 1 b. Where a soldier, *before the expiration of his term,* received under the fourth article of war a discharge in due form, though charges were then pending against him, the authority ordering the discharge not having been made aware of such charges, *held* that *the discharge was executed and could not be revoked with* a view to bringing the soldier to trial; *that he had, by the discharge, duly become a civilian and was no more than any other civilian under the control of the military authorities.* R. 23, 483, May, 1867; P. 50, 295, Nov., 1891; C. 1791, Jan. 2, 1896; 12342, Apr. 4, 1902."

11. In Op., JAG, 1880, it is said (emphasis added), p. 209:
"*Nor can a person,* who, by reason of acceptance of resig-

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At page 28, the respondents next contend that (emphasis ours):

> **"The long-continued consistent administrative interpretation supports the conclusion that a discharge relates only to the period it purports to cover and does not release a deserter from liability for deserting from a prior unexpired enlistment."**

While the above statement, so far as it goes, may be sound, the *conclusions* which respondents' counsel attempt to draw therefrom are *not*.

In the **first** place, as we have previously demonstrated (*ante*, pp. 7-16) *the petitioner's prior enlistment had in fact expired* by the date he was actually discharged.

In the **second** place, as we have previously demonstrated (*ante*, pp. 5-22), in *any* event, the President and the Secretary of War *could*, as a matter of law, and *did* as a matter of fact, authorize (by RR1-1 and other related "discharge procedures") the discharge of *all* enlisted men (regardless of whether they entered the service by enlistment or induction) provided *only* that they had enough "points" and did not

> "volunteer for retention on duty,"

and the authority so to discharge enlisted men was (by said procedures so promulgated by the Secretary of War) delegated down to those who carried out such discharges in the 21 "separation centers" mentioned by the respondents (p. 34).

In the **third** place, in the case at bar the petitioner's discharge was *not* (as respondents' counsel contend) *limited* to his 1944-1946 draft induction obligation, even though

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nation, dismissal, discharge, &c., has become wholly detached from the military service, *be made liable to trial* by court-martial, for offences committed while in the service, *on the ground that such offences were not discovered till after he had left the army.*" XXVII, 374.

it did, on the reverse side, mention the date of his induction. On the *contrary*, it clearly stated that it was given (R. 39)

> "for the convenience of the Government RR1-1 (Demobilization) (AR 615-365)" (which RR1-1 set up the so-called "point system";

clearly demonstrated, by the statement that the petitioner had

> "ASR SCORE (2 Sep. 45) 44,"

that he was entitled to be so discharged (along with 7,500,000 others); and, in its formal "granting clause," duly signed by a "field officer" (as required by AW 108), discharged him, not merely from his 1944-1946 draft "induction" but

> "from the military service of the United States."

Furthermore, according to Army law, it makes no difference that, as in the case at bar, the "arm" or "service" (viz.: "Infantry" or "Ry. Opn. Bn.", R. 39) is *not* correctly stated on the discharge certificate, and that such a discharge, even though erroneous in that respect, nevertheless *discharges* him, *not* merely from the particular "arm" or "service," but from

> "the service,"[12]

exactly as his certificate expressly here states (R. 39).

12. In Op., JAG, 1918, Vol. 2, it is said (emphasis ours), p. 1033:

"DISCHARGE: *Erroneous Designation of Branch of Service; Effect.*

"An efficiency board found a captain, Coast Artillery Corps, to be incompetent, but recommended that he be continued in the service as a first lieutenant, Quartermaster Corps. Thereafter, on October 25, 1918, he was appointed a captain in the Quartermaster Corps. On November 20, 1918, by direction of the President, he was honorably discharged from the service, under section 9, act of May 18, 1917 (40 Stat. 76, 82). *The discharge described him as 'Captain, C.A.' The order of discharge may have been issued under a mistake of fact, but it is not limited. It clearly discharges him from the service and not merely from the Coast Artillery Corps.*"

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Let us now examine the "authorities" cited by the respondents in support of their said contentions.

Their quotations (pp. 28-29) from the 1928 and 1949 Manuals for Courts-Martial, to the effect that (emphasis ours):

> "A discharge, other than dishonorable, releases only from the particular *contract* and *term of enlistment* to which it relates, and therefore does not terminate *other* subsisting *enlistments* or relieve the soldier from liability to trial by court-martial for an offense committed during such *enlistments*";

from Dig. Op. JAG, 1895, to the effect that (emphasis ours):

> "an honorable discharge was simply a termination of the *particular enlistment* which the soldier was then serving; that it was a discharge only from *that enlistment*, and did not apply to, or discharge from, other *prior unexpired enlistments*, if any, * * * Unlike a dishonorable discharge, * * * an honorable discharge from *one enlistment* does not release the soldier from the consequences of a desertion committed under a *prior enlistment*";

and from Dig. Op., JAG, 1912, to the effect that (emphasis ours):

> "An honorable discharge releases from the particular *contract* and term of *enlistment* to which it relates, and does not therefore relieve the soldier from the consequences of a desertion committed during a *prior* enlistment";

certainly do *not* support the respondents' *conclusion* that the petitioner's 1946 discharge

> "from the military service of the United States" "for the convenience of the Government (Demobilization) RR1-1",

did not discharge him from all subsisting enlistments and inductions.

It should be kept in mind, in considering such authorities,

(1) That they were all written in *peace time; not* during an active war.

(2) That they expressly discuss *only* the effect of a discharge from one *enlistment* upon another *enlistment; not* the effect of a discharge of all soldiers whose "periods of service" had involuntarily "been extended" or who had been involuntarily "inducted" under the draft.

(3) That, as we have previously demonstrated (*ante*, pp. 10-11), in peace time honorable discharges are normally issued only (1) at the expiration of a voluntary "enlistment" period, or (2) by a "purchase" by the soldier prior to the expiration of his "enlistment" period.

It should also be kept in mind that there are, in general, **three** *types of discharges*, (1) The **usual** (honorable) *discharge*, at the expiration of a period of voluntary enlistment (or by purchase); (2) *The* **summary** (honorable) *discharge*, by the President or the Secretary of War (as hereunder RR1-1), prior to the end of a term or "for the convenience of the Government; and (3) the **dishonorable** *discharge* by sentence of a general court-martial.[13]

13. In Op., JAG, 1880, it is said (emphasis added), p. 231:

"**I. Honorable and Dishonorable Discharge Distinguished.**

"1. **Three** *separate forms of discharge* of soldiers are authorized in our law: **1.** *The ordinary regular discharge at the end of the term of enlistment* and by reason of its expiration, and which is necessarily an honorable discharge: **2.** *The summary discharge* authorized by the Fourth Article of War, to be given to a soldier *before his term of enlistment has expired, by the order of the* President, the *Secretary of War*, or a department commander, and which, as these officials cannot *punish*, and are simply invested by the Article with a discretion to cancel a contract when the public interest or convenience requires it, is also an honorable discharge in law: **3.** *The discharge imposed as a punishment by general court martial*, (under the authority of the same Article), and known as 'dishonorable' discharge. XIX, 321; XXXIV, 358; XXXVI, 537; XXXVII, 230; XXXVIII, 342; XLII, 311. (See FOURTH ARTICLE § 3.)"

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As stated by the respondents (pp. 28-29), a "**dishonorable** discharge" does *not* relate to *any* particular contract of *enlistment* but completely separates the soldier from

"the military service."[14]

It should also be noted that, under Army law, *a* **summary** *dismissal,* by the authority of the President (or by the Secretary of War by regulations promulgated by him as head of the department) *prior to the expiration of the term of service,* although "honorable," *is similar to a dishonorable discharge* in that the individual

> "is completely relegated to a *civil* status, having in law no nearer or other relation to the military service than has any civilian who has never been in the army."[15]

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14. In Dig. Op., JAG, 1912, it is said (emphasis ours), p. 462:
"**XXII** B. *A dishonorable discharge* does not relate to any particular contract or term of enlistment; it *is a discharge from the military service* as a punishment—a complete expulsion from the Army *and covers all unexpired enlistments.* A soldier thus dishonorably discharged *can not* be made amenable for a desertion or other military offense committed under a prior enlistment except as provided in the sixtieth article of war. Nor would a subsequent enlistment after such dishonorable discharge operate to revive the amenability of the soldier for such offenses. P. 53, 46, 179, Apr., 1892; 55, 165, Aug., 1892; 59, 55, 86, Apr., 1893; C. 3585, Nov., 1897; 7614, Jan. 25, 1900; 13579, Nov. 3, 1902; 24658, Mar. 14, 1909."

15. In Op., JAG, 1880, it is said (emphasis added), pp. 239-240:
"1. *Dismissal by executive order* is quite distinct from dismissal by sentence. The latter is a *punishment:* the former is *removal from office.* The power to dismiss, which, as being an incident to the power to *appoint* public officers, had been regarded since 1789 as vested in the President by the Constitution, was, for the first time in 1866, (by the Act of July 13th of that year, re-enacted in the second clause of the present 99th Article of War and in Sec. 1229, Rev. Sts.,) expressly divested by Congress, in so far as respects its exercise in time of peace. By the statute law it is now authorized only in time of war. *During the late war it was exercised in a great number of cases,* sometimes for the purpose of sum-

The petitioner's quotation (pp. 29-30) from Dig. Op. JAG, 1912-40, p. 381, is distinguished from the case at bar by the fact that, although it involved a drafted inductee, he was not (in 1919) discharged

> "from the military service of the United States" "for the convenience of the Government"

under the "point system" as was the petitioner here.

The *Case of Taylor*, CM 336336 (not reported) in which, say the respondents (p. 30),

> "the Board of Review, on May 13, 1949, held legally sufficient a conviction for desertion where the accused had received an honorable discharge from a *subsequent enlistment*,"

does *not* support the respondents' conclusions. In the *first* place, I am advised by a letter from the Office of the Judge Advocate General, dated 25 September 1951, that this soldier's discharge, in 1947, was from a subsequent December 12, 1945 (so that he did not come within the

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marily ridding the service of unworthy officers, *sometimes in the form of a discharge or muster-out of officers, whose services were simply no longer required.* The distinction between this species of dismissal and dismissal by sentence is illustrated by the fact that the former has, with the sanction of legal authority, been repeatedly ordered in cases where a court martial has previously *acquitted* the officer of the very offences on account of which the summary action has been resorted to. XXIII, 265; XXVI, 5; XXXI, 557; XXIX, 251; XLII, 470."

P. 241:

"8. There can be no *revocation* of a duly executed order of dismissal, however unmerited or injudicious the original act may be deemed to have been. *For distinct as dismissal by order is,* in its *nature,* from dismissal by sentence, (see § 1, *supra,*) *the effect* of the proceeding in divesting the office *is the same* in each case. *An officer dismissed by an order,* though his dismissal may have involved no disgrace, *is assimilated to an officer dismissed by sentence,* (see DISMISSAL, I § 6), *in so far that he is completely relegated to a civil status,* having in law no nearer or other relation to the military service than has any civilian who has never been in the army. * * *"

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scope of the "point system") *"enlistment"* and that his subsequent discharge from said *"enlistment"* was *not* under the so-called "point system" (RR1-1). In the *second* place, the opinion (of which I have a copy) merely says that

> "The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence,"

and does *not* indicate that the Board knew of or even considered the issue here before this Court.

Hence, even under the Army's own "administrative interpretation," the petitioner's 1946 discharge

> "from the military service of the United States" "for the convenience of the Government"

discharged him from all subsisting enlistments and inductions and made him a civilian, no longer subject to trial by court-martial for desertion, or any other offense not specified under AW 94.

At page 31, the respondents attempt to distinguish the *Drainer* case (*Ex parte Drainer*, 65 F. Supp. 410, affirmed *sub. nom. Gould* v. *Drainer*, 158 F. 2d 981 (C. A. 9) on the ground that (emphasis ours):

> "The Articles for the Government of the Navy, *as distinguished from AW 107, did not make mandatory the serving of time lost in desertion*, nor did they *prohibit a discharge prior to the end of the term, as is the case under AW 108.*"

Both of these statements are absolutely untrue and the *Drainer* case is *not* to be distinguished thereby. As we have previously demonstrated (*ante*, pp. 5-8), **AW 107 does not make mandatory the serving of time lost in desertion**, and, on the contrary, the *"liability"* to be required so to serve can be and was here *waived* by the 1946

discharge; **and**, as we have also previously demonstrated (*ante*, pp. 17-22), **AW 108 does not prohibit a discharge prior to the end of a term**, and, on the contrary, such discharges *can be* and *were* (to the extent of some 7,500,000 men in 1946) issued by some 21 separation centers under discharge procedures (RR1-1, the "point system")promulgated by the Secretary of War.

At pages 31-32, respondents' counsel go on to say

> "that Congress has now adopted for the entire military service the Army's interpretation of the effect of a discharge. Subdivision (c) of Article 3 of the new Uniform Code of Military Justice (64 Stat. 109; 50 U. S. C. Supp. IV, 553 (c)) provides that 'Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of this code by virtue of a separation from any subsequent period of service.' This provision was prompted by *Ex parte Drainer*, House Report No. 491, 81st Congress, 1st sess., April 28, 1949, p. 12."

There are several obvious *flaws* in this contention. In the **first** place, the language quoted (viz: "separation from a *subsequent* period of service") would *not* support the respondents' contention here because, as we have heretofore demonstrated (*ante*, pp. 24, 29-30), the 1946 discharge was *not* merely from the subsequent 1944-46 "period of service," but was from

> "the military service of the United States"

with the intention of reducing the size of the army (by some 7,500,000 men), *regardless* of the type or length of their "periods of service,"

> "for the convenience of the Government."

In the **second** place, as is pointed out in 50 American Jurisprudence, "Statutes," § 275, at page 202:

> "* * * The general rule is that a change in

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> phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended, and amendments are accordingly generally construed to effect a change, particularly where the wording of the statute is radically different, * * *."

In the **third** place, the said Uniform Code of Military Justice is, by its very terms, *not* applicable to offenses occurring *before* May 31, 1951 (50 U. S. C. A., 1950, § 551).

At pages 33-34, respondents' counsel attacks our contention—that the petitioner has been discharged from all subsisting enlistments and inductions—on the ground that (emphasis ours):

> "It would permit a wartime deserter, who has committed a *heinous* offense, * * * to escape prosecution by committing another wrongful act, fraudulently *enlisting* without revealing his prior enlistment."

In the **first** place, as we have previously demonstrated (*ante*, pp. 8-12), since he was "inducted" under the draft he did *not* "fraudulently *enlist*."

In the **second** place, once so inducted, he served honorably and well, as is indicated by his promotion to a sergeant, by his being awarded the Good Conduct, Occupation and Victory medals and the European, African and Middle Eastern Theatre ribbons, with Bronze Battle Star (R. 39), and by his being given an "honorable discharge" after 21 months service overseas.

In the **third** place, the use of the word "*heinous*" in referring to a desertion in the Continental United States before any indication that he had been scheduled for shipment overseas, particularly by a married man with a wife, a daughter and a grandchild, shows either ignorance or

disregard for well-established Army law to the effect that desertion does *not*

"affix an irreparable taint upon his status"

or

"preclude his receiving an honorable discharge"

after subsequent honorable and faithful service.[16]

The respondents' argument (pp. 34-36) to the effect that a ruling in favor of our contention that the petitioner's 1946 discharge discharged him from all subsisting enlistments and inductions

> "would be particularly unrealistic in the light of the practical situation confronting the Army after the termination of hostilities in World War II,"

is *not* at all convincing and, if anything, establishes *our* contention.

It certainly clearly demonstrates

(1) That, upon the conclusion of such hostilities, the Army had in its service some 7,500,000 men whose

16. In Op., JAG, 1880, it is said (emphasis ours), p. 226:

"11. That *desertion per se does not so taint the record of a soldier as to disqualify him to receive a final honorable discharge*, or to enjoy the rights to pay and bounty incident upon such a discharge, is now fully and finally settled. (See BOUNTY § 5; DISCHARGE § 6.)"

P. 233:

"6. *The fact that a soldier has been a deserter does not affix an irreparable taint upon his status* or service when returned from desertion, *or preclude his receiving an honorable discharge*, if either he be restored to duty without trial, or having been tried and sentenced, he yet, by reason of his imprisonment being fully executed or being remitted before the end of his term, is returned to duty and is in the performance of faithful service when his term is completed. *A discharge in the usual form then given to him is a formal final judgment passed by the government upon his entire military record* and an authoritative declaration by it that he leaves the military service in a status of honor. Thus honorably discharged he cannot, by reason of his having formerly deserted, be deprived of any rights to pay, allowances or bounty usually incident upon honorable discharge. XXVI, 484."

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"periods of service" (under "enlistments," "extensions of service" or the draft) had *not* expired.

(2) That, "for the convenience of the Government," it had to discharge them promptly from the service, *without regard* to whether their being in the service was the result of unexpired "enlistments," "extensions of service" or draft "inductions," and *without regard* to whether or not they had "bad time" which they were *"liable"* to serve out under AW 107.

(3) That such discharges, even before their "periods of service" had expired, were fully authorized by "discharge procedures" promulgated by the Secretary of War for the President under AW 108.

(4) That such men were discharged "for the convenience of the Government" under such "discharge procedures" as their "ASR scores" were reached.

(5) That the petitioner here was so discharged when "ASR score 44" was reached.

The attempt of respondents' counsel to avoid the obvious effect of this situation by claiming that (p. 35)

> "The only effective method of discovering deserters is by means of fingerprints,"

is *not* at all convincing.

The petitioner always used the same name, "William H. Giese," was inducted in 1944 at his home town (Champaign, Illinois) and certainly had the same fingerprints at all times. Why the Army could not have checked them between early 1944 (when he was inducted) and June, 1946 (when he was discharged) does not appear.

Furthermore, as we have previously demonstrated (*ante*, p. 22), a discharge, even under an erroneous conception of the facts, is entirely valid and cannot, as a matter of Army law, be revoked or modified.

The statement of respondents' counsel (pp. 35-36) that (emphasis ours):

"In this respect it should be noted that petitioner's

> contention is that his honorable discharge, *not his subsequent military service,* terminated military jurisdiction and in effect pardoned the desertion,"

is *not* correct. We *do* contend that his subsequent 1944-1946 military service, which was faithful and honorable *did* complete his full 3-year, 1930, "enlistment period," thus giving to his country the full 3 years' service he had contracted to give (when a young man, not a grandfather, as now).

Respondents' concluding contentions (p. 36) that to sustain our contention would also

> "be a contradiction of the rule that enlistment is a contract,"

and

> "would thwart the clear intent of Congress that soldiers should not be permitted to evade their enlistment obligations by deserting,"

is *not* at all convincing when it is remembered that, as we have previously demonstrated (*ante*, pp. 15-16), giving the petitioner credit only for his "good" time, he had actually served out his full 3-year, 1930 "enlistment contract" in full and, in so doing, did so well that he was promoted to Sergeant, received the decorations heretofore mentioned, and, after 21 months service overseas, received his "honorable discharge"

> "from the military service of the United States."

We therefore submit that the issuance, during the general demobilization of 1946, of a discharge, "for the convenience of the Government" under "RR1-1" (the "point system"), certifying that this petitioner was thereby

> "honorably discharged from the military service of the United States,"

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discharged him from *all* subsisting enlistments and inductions and made him a *civilian,* no longer subject to trial by court-martial for desertion or any other offense not specified under Article of War 94.

II.

BY VIRTUE OF HIS CIVILIAN STATUS FOLLOWING HIS 1946 DISCHARGE "FROM THE MILITARY SERVICE OF THE UNITED STATES," THE PETITIONER WAS NOT REQUIRED TO EXHAUST SUCH "ADMINISTRATIVE REVIEW PROCEDURES" AS MAY BE AVAILABLE TO MILITARY PERSONNEL UNDER THE ARTICLES OF WAR BEFORE RESORTING TO HABEAS CORPUS.

In answer to this proposition in our original petition (pp. 29-34), the respondents contend (pp. 11-23) that

> **"The Resort to Habeas Corpus Is Premature, Since the Military Procedures Have Not Been Completed."**

Their **first** statement under this contention is (p. 11) that (emphasis ours):

> "In *Gusik* v. *Schilder,* 340 U. S. 128, this Court held that resort to habeas corpus *by a person detained under sentence of a court-martial* is premature if the petition is filed before all the available procedures prescribed in the Articles of War, including the remedy of a motion for a new trial under AW 53 have been exhausted."

As we pointed out in our original petition (pp. 31-32), the said *Gusik* case did *not* involve a veteran who had received an "honorable discharge" prior to his trial by court-martial. On the *contrary,* he was *still* on *active duty* with the United States Army in Italy at the time of his

arrest, trial and conviction by court-martial for murder, and his *only* contentions were (1) that no thorough and impartial pre-trial investigation had been made; (2) that the Trial Judge Advocate had failed to call material witnesses; and (3) that he had been denied the assistance of effective counsel. Hence the *Gusik* case does *not* (as respondents contend) hold that *any* person

"detained under sentence of a court-martial"

must first exhaust all military remedies before resorting to habeas corpus. It merely holds that *army personnel still on active duty* at the time of their trial and conviction *must do so.* Furthermore, the question presented in the case at bar (*viz:* whether a *former* soldier, who has been *discharged* before his trial and had thus become a *civilian,* must do so) was neither involved nor discussed by this Court. Hence the *Gusik* case is *not* applicable and does *not* support the respondents' contention.

Apparently recognizing that their said opening statement goes *too* far, the respondents concede (pp. 12-13, 14, 15, 18) (emphasis ours) that:

> "It is recognized that the *exhaustion* of the *review procedures* provided by the authority which is depriving the prisoner of his liberty *is not a jurisdictional prerequisite of habeas corpus, and that* in appropriate cases *the federal courts retain the discretion to grant the writ even where an appeal has not been taken. Bowen* v. *Johnston,* 306 U. S. 19. The federal courts have adopted this self-imposed limitation on the grant of the writ in order to promote the orderly administration of justice by discouraging the use of habeas corpus as a substitute for ordinary administrative and review procedures. * * *.
>
> "Compare *Ohio* v. *Thomas,* 173 U. S. 276 (holding that the court would take jurisdiction of a habeas corpus proceeding to release a federal officer held for trial by a state); *In re Neagle,* 135 U. S. 1.

"We do not present these arguments as technical limitations on the district court's *discretion* to grant the writ. * * *."

We fully agree with the respondents' statement that:

"exhaustion of review procedures is *not* a jurisdictional prerequisite to habeas corpus."

After making this concession, the respondents go on to contend (pp. 13-14, 15, 16), however, that (emphasis ours):

"This case is not one in which an exception should be made to the general rule. Assuming, for the sake of the argument, that the petitioner can eventually establish on the merits that he is entitled to his freedom, nevertheless this case is still not an appropriate one for the grant of habeas corpus prior to the completion of the regular military procedures.

"The petitioner relies principally on the argument that he was a civilian at the time of his arrest, trial, and conviction, and was therefore not subject to the authority of the particular court-martial or of any other court-martial. He bases his argument upon the honorable discharge which was given him in 1946, which, it is contended, relieved him entirely from subjection to military law. In meeting this argument, it is not necessary to take the position that habeas corpus should not be allowed in a situation where the military authorities attempt to reach out into the civilian population and assume authority over an individual who is not and never has been subject to military justice. (*cf. Billings* v. *Truesdell*, 321 U. S. 542. * * *.

* * * * *

"Here, on the other hand, stated in terms most favorable to the petitioner, *a very real question of jurisdiction exists*, since the honorable discharge on which he relies relates specifically to his term of service from 1944 to 1946, and makes no specific reference to releasing him from service for any earlier period or terminating his liabilities for any prior derelictions. We shall argue in Point II of this brief

that the action of the court-martial was entirely legal and proper; for the present, it suffices to point out that, whatever the ultimate disposition of the case on the merits, *the assertion of jurisdiction* by the court-martial *does not appear to have been arbitrary* or without color of law.

"Since the action of the court-martial was *not on its face arbitrary*, petitioner's argument comes down to the proposition that because the issue he raises is one which challenges the ultimate jurisdiction of the military authorities to hold and try him, he is now entitled to have that issue determined by the civil courts rather than awaiting the final determination of the military courts."

The respondents' said contention—that lack of jurisdiction of a military court-martial over a civilian is not, prior to the completion of Army review procedures, a ground for release on a writ of habeas corpus where the question of its jurisdiction is "*debatable*"—is demolished by the very case above cited by the respondents. In that case (*Billings* v. *General Truesdale*), the petitioner, a "conscientious objector", was ordered by his draft board to report for induction, actually reported to the Army's induction center at Ft. Leavenworth, Kansas, spent the night there in the Army's barracks, had Army "chow", took Army physical and mental examinations and was read the oath of induction by an Army officer and, on his refusal to take said oath, was told by said officer that his refusal made no difference and that "you are in the Army now". When he refused to submit to being finger-printed, he was arrested and tried and convicted by court-martial. Although the question of jurisdiction of the court-martial was so "*debatable*" that Mr. Justice Douglas, who is noted for his short and concise opinions, took some sixteen pages to dispose of the issue and one Justice dissented, this Court, *without requiring him to exhaust any military re-*

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view procedures, reversed the lower courts' rulings discharging the writ of habeas corpus.

At pages 16-17, the respondents go on to say that:

> "To make sense of the petitioner's argument, it must be limited to jurisdiction *in personam;* that is, to situations where the petitioner is asserted not to be one of the class over which the imprisoning court has power. *There seems to be no logical basis for arguing that lack of jurisdiction in personam should be considered a more fundamental error than lack of jurisdiction for any other reason.* An unconstitutional statute used as a basis for depriving a man of his liberty would seem as serious a defect as lack of jurisdiction over the person. But it has been held that the issue of constitutionality does not justify the grant of habeas corpus prior to exhaustion of appellate procedures. *Henry* v. *Henkel*, 235 U. S. 210; *Ex parte Royall*, 117 U. S. 241. *Cf. In re Lancaster*, 137 U. S. 393. Similarly, to deprive a man of his liberty under a misconstruction of a statute, so that in the end it will be found that he did not commit any crime at all, seems to be as serious an infringement of his constitutional rights. *Sunal* v. *Large*, 332, U. S. 174."

Contrary to the assumption of the respondents, there is a very fundamental and well established difference (insofar as requiring the "exhaustion" of "administrative," or even "judicial," "review procedures" is concerned) **between an original and continuing lack of jurisdiction over the person or of the subject matter, on the one hand, and other bases for habeas corpus** (such as a *loss* of jurisdiction due to the denial of "due process" during the trial, or a misconstruction of a statute, or an unconstitutional statute), **on the other; particularly in cases where a civilian is tried by a court-martial, which is a tribunal of extremely limited jurisdiction.**

In *State of Ohio* v. *Thomas*, 173 U. S. 276, 19 S. Ct. 453 (1899), cited by respondents (p. 15), the petitioner,

Governor of a Federal soldier's home in Ohio, was arrested on a charge of violating a State law prohibiting the use of oleomargarine and was taken before a justice of the peace. After his contention, that as a Federal officer he was not liable to trial in State courts, had been denied, he consented to trial without a jury and was tried, convicted and fined $50, he to be imprisoned if it be not paid. He refused to pay it, and *without appealing*, resorted to habeas corpus in a Federal court on the ground that the State had no jurisdiction to try him.

In *affirming* that ruling, this Court, speaking through Mr. Justice Peckham, said:

> "Under the facts herein the state court had no jurisdiction to try the appellee for the offense charged in the written complaint made to the magistrate. See authorities cited in *Re Waite*, 81 Fed. 359.
>
> * * * * *
>
> "Some of the same authorities also show that this is one of the cases where it is proper to issue a writ of habeas corpus from the federal court, instead of awaiting the slow process of a writ of error from this court to the highest court of the state where a decision could be had. * * *"

In *Cunningham* v. *Neagle* (*In re Neagle*), 135 U. S. 1, 10 S. Ct. 658 (1890), also cited by respondents (p. 15), Neagle, a Deputy United States Marshal, who had been appointed for the purpose of protecting Mr. Justice Field of this Court while sitting as a Circuit Judge in California against injury repeatedly threatened by Mr. and Mrs. Terry, disgruntled litigants, shot and killed Mr. Terry while he and his wife were actually attacking Mr. Justice Field. Upon his arrest by a California sheriff on a charge of murdering Terry, Neagle resorted to habeas corpus in a Federal Circuit Court and was ordered discharged from the custody of the California sheriff on the ground that,

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as a Federal officer in the performance of his duty, he was not subject to trial in the California courts.

In *affirming* his discharge, this Court *without requiring him to stand trial in California and appeal*, concluded that:

> "He was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction."

Sunal v. *Large*, 332 U. S. 174, 67 S. Ct. 1588 (1947), repeatedly cited by the respondents (pp. 13, 17, 22) does *not* sustain the respondents' position. There the petitioners, Jehovah's Witnesses, who claimed to be exempt from the draft as ordained ministers, were tried in the Federal courts for refusing to submit to induction. The trial courts, following many similar rulings by other courts, had refused to permit them to introduce evidence attacking the draft board's classification and they had been convicted and sentenced to prison. After their time to appeal had expired, this Court (in another case) had held that such classification *could* be challenged in the trial courts, and the petitioners then sought their release on writs of habeas corpus, which were denied.

In upholding those denials, this Court (in a 6-3 decision written by Mr. Justice Douglas) at pages 179, 181, made it clear that the *error during the trial* was *not jurisdictional* when he said:

> "• • • It is plain, however, that the writ is not designed for collateral review of errors of law committed by the trial court—the existence of any evidence to support the conviction, irregularities in the grand jury procedure, departure from a statutory grant of time in which to prepare for trial, *and other errors in trial procedure which do not cross the jurisdictional line. Cf. Craig* v. *Hecht*, 236 U. S. 255, 44 S. Ct. 103, 68 L. Ed. 293.
>
> • • • • •

> "* * * *The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law* in excluding the defense which was tendered. *That error did not go to the jurisdiction of the trial court.* * * *." (Emphasis added.)

Nor does *Henry* v. *Henkel*, 235 U. S. 210, also cited by respondents (pp. 8, 14, 16), support their position. He did *not* dispute jurisdiction over his *person* but, on the contrary, alleged: (1) that the Congressional resolutions did not justify the questions which he had refused to answer; (2) that the facts alleged did not constitute an offense; and (3) that, if they did, the statute was unconstitutional. Furthermore this Court merely *affirmed* the trial court's exercise of its *discretion* in *denying* the writ. In the case at bar, Judge Igoe, in *his discretion, granted* the writ and *discharged* the petitioner.

The case of *Ex parte Royall*, 117 U. S. 241, cited by the respondents (p. 17), likewise does *not* support such a contention. There the petitioner was in custody under an indictment charging that he had, in violation of a Virginia statute (making it a crime to sell a coupon clipped from one of that State's bonds without paying a license fee of $1,000 plus a tax of 20% of the face value of such coupon) which he contended was unconstitutional and void. He resorted to habeas corpus on that ground and the Federal Circuit Court dismissed his petition. He did *not* challenge the court's jurisdiction over his *person*.

In *affirming* that ruling, on the ground that the trial court had not abused its *discretion*, this Court, through Mr. Justice Harlan, said (emphasis ours):

> "* * * Under such circumstances, does the statute imperatively require the circuit court, by writ of habeas corpus, to wrest the petitioner from the state officials in advance of his trial in the state court?

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> We are of opinion that *while the circuit court has the power to do so, and may discharge the accused in advance of his trial* if he is restrained of his liberty in violation of the national constitution, *it is not bound in every case to exercise such a power immediately upon application being made for the writ.*
> • • •
>
> "As it does not appear that the circuit court might not, *in its discretion* and consistently with law and justice, have denied the applications for the writ at the time they were made, we are of opinion that the judgment in each case must be affirmed, but without prejudice to the right of the petitioner to renew his application to that court at some future time should the circumstances render it proper to do so. Affirmed."

In the case at bar, as we have said, Judge Igoe in his *discretion, discharged* the petitioner on the writ.

In *In re Lancaster,* 137 U. S. 393, also cited by respondents (p. 17), another case where the petitioner did *not* challenge the court's jurisdiction over his *person,* the full opinion is as follows:

> "The petitioners were indicted under sections 5508 and 5509 of the Revised Statutes, on the 20th of November, 1890, in the circuit court for the southern district of Georgia, and have been taken into custody. They have not invoked the action of the circuit court upon the sufficiency of the indictment by a motion to quash or otherwise, but ask leave to file in this court a petition for a writ of habeas corpus, upon the ground that the matters and things set forth and charged do not constitute any offense or offenses under the laws of the United States, or cognizable in the circuit court, and that for other reasons the indictment cannot be sustained. In this posture of the case we must decline to interfere. The application for leave to file the petition is denied."

The respondents also say (p. 12) that:

> "The *Gusik* decision does not, of course, expound a

> new doctrine (see, *e. g.*, *Mooney* v. *Holohan*, 294 U. S. 103, *Ex parte Hawk*, 321 U. S. 114); its particular significance in this case is that it applies a well-established policy to military procedures and to the specific remedy provided by AW53."

This, likewise, is *not* correct. *Mooney* did not contend that he was not *personally* subject to trial by the State of California for murder. He contended only that the court had *lost* jurisdiction *during* the trial because he had been denied "due process of law" during his trial in that the State's prosecuting officials had deliberately used perjured evidence to convict him; but he had never given the California courts an opportunity to pass on the question by habeas corpus. *Hawk* likewise did *not* contend that he was not *personally* subject to trial by the State of Nebraska for murder. Like *Mooney*, he contended that the court had *lost* jurisdiction during the trial because the State's prosecuting officials had deliberately used perjured evidence to convict him; plus a contention that, by too prompt a trial, he had been denied the effective assistance of counsel; but he had not given the Nebraska trial courts an opportunity to pass on the question by habeas corpus or *quorum nobis*. Hence *neither* the *Mooney* nor *Hawk* case supports the respondents' contention here.

At page 16, the respondents also say (regarding our position on *original lack* of *jurisdiction* over the *person*) that:

> "If this argument is based on lack of jurisdiction as such, it is fallacious, since *the ultimate ground for all habeas corpus proceedings is lack of jurisdiction* in the persons depriving the petitioner of his liberty. See *Whelchel* v. *McDonald*, 340 U. S. 122, 126. Therefore, in every case where there is a sound basis for seeking habeas corpus there would be no room for requiring the exhaustion of appellate procedures. Petitioner's argument would eliminate in its entirety the procedure of requiring that appeals be completed."

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This is *not* a correct statement of the law or of our contention and the *Whelchel* case does *not* so hold.

As is stated by Mr. Justice Douglas, in a footnote to *Sunal* v. *Large*, 332 U. S. 174, 67 S. Ct. 1588, at page 183,

> "The remedy of habeas corpus extends to a case where a person is in custody in violation of the Constitution or a law * * * of the United States: R. S. § 753, 28 U. S. C. § 453."

As was said by Mr. Chief Justice Hughes, in *Bowen* v. *Johnston*, 306 U. S. 19, cited by the respondents at p. 12, although a tribunal may *originally* have jurisdiction of both the person and of the offense charged, *if*

> "*in its proceedings his constitutional rights have been denied*, the remedy of habeas corpus is available." (Citing some 8 earlier Supreme Court cases) (emphasis ours).

That was the type of situation presented in the *Mooney*, *Hawk* and *Gusik* cases cited by the respondents and previously discussed by us, in which *loss* (during the trial), not *original lack, of jurisdiction* must often be decided by "review procedures" *before* resorting to habeas corpus, but that is *not* the situation (*original* and continuing *lack* of *jurisdiction over the person and the offense*) presented by the case at bar.

Furthermore, the situation in the *Whelchel* case was the *same*, viz: the accused *conceded* that he was *still* in the Army and was subject to its jurisdiction (in fact he had *never* been discharged at all) and, in the words of Mr. Justice Douglas, merely contended that:

> "the military tribunal which tried petitioner was *deprived* of jurisdiction *by reason of the treatment of the insanity issue* tendered by petitioner. We hold that it was not." (Emphasis ours.)

At pages 17-18, the respondents cite and quote from

Mr. Justice Holmes' language in *United States* v. *Sing Tuck*, 194 U. S. 161, 24 S. Ct. 622 (1904), for the proposition that petitions for writs of habeas corpus which are based on a lack of jurisdiction over their *person* are treated *no* differently than those alleging that they had not committed a crime because the statute involved had been misconstrued. Such is ***not*** the correct construction of that decision. In the **first** place, the Chinese involved had been seized while attempting to enter this country from Canada and had refused to give any information whatsoever except their names and merely contended, without giving any facts or details, that they were American citizens by birth. Referring to this refusal, Justice Holmes said:

> "Now, when these Chinese, having that opportunity, saw fit to refuse it, we think an additional reason was given for not allowing a habeas corpus at that stage,"

and, went on to say that:

> "we agree with the court of appeals that a petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out at least a prima facie case. A mere allegation of citizenship is not enough."

But the **real** key to the decision is the unquoted balance of the same paragraph partially quoted by the respondents, viz:

> "* * * In *Gonzales* v. *Williams*, 192 U. S. 1, *ante*, p. 177, 24 Sup. Ct. Rep. 177, *there was no use in delaying the issue of the writ until an appeal had been taken, because in that case there was no dispute about the facts, but merely a question of law.* Here the issue, if there is one, is a pure matter of fact,—a claim of citizenship and in a form naturally raising a suspicion of fraud." (Emphasis ours.)

In *Gonzales* v. *Williams*, 192 U. S. 1, 24 S. Ct. 177 (1904), above cited and distinguished by Justice Holmes, Miss

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Gonzales, a native of Puerto Rico, had, after its becoming a "possession of the United States" after the war with Spain, come to the port of New York where the Commissioner of Immigration prevented her from landing and detained her as an "alien immigrant". In *reversing* a Circuit Court order dismissing the writ of habeas corpus, this Court, through Mr. Chief Justice Fuller, had said:

> "We think it clear that * * * citizens of Puerto Rico, whose permanent allegiance is due to the United States, * * * are not 'aliens' and upon their arrival by water at ports of our mainland, are not 'alien immigrants', within the intent and meaning of the act of 1891.
>
> * * * * *
>
> "And in the present case, as Gonzales did not come within the act of 1891, *the commissioner had no jurisdiction to detain her by deciding the mere question of law to the contrary; and she was not obliged to resort to the Superintendent or the Secretary.*" (Emphasis added.)

That even Mr. Justice Holmes so regarded his holding is shown by his subsequent statement, in *United States* v. *Ju Joy*, 198 U. S. 201, 25 S. Ct. 645, that:

> "* * * the first of them is answered by the case of *United States* v. *Sing Tuck*, 194 U. S. 161, 170, 48 L. Ed. 917, 921, 24 Sup. Ct. Rep. 621: 'A petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out a prima facie case'."

This same general view of the case was taken by Mr. Justice Brandeis, in *United States* v. *Tod*, 263 U. S. 153, 44 S. Ct. 56, when he said, at pages 152-153, that:

> "If, in the deportation proceedings, Bilokumsky had claimed that he was a citizen and had supported the claim by substantial evidence, he would have been entitled to have his status finally determined by a judicial, as distinguished from an executive, tribunal. *Ng Fung Ho* v. *White*, 259 U. S. 276, 281, 42 Sup. Ct.

492, *66 L. Ed. 938. But he made* no such claim at the time; nor does he now contend, by allegation in his petition for habeas corpus, or otherwise, that he is a citizen of the United States. * * *"

* * * * *

"It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. *United States* v. *Sing Tuck*, 194 U. S. 161, 167, 24 Sup. Ct. 621, 48 L. Ed. 917. * * *"

Somewhat this same view is expressed in *Kessler* v. *Strecker*, 307 U. S. 35, 59 S. Ct. 700 (argued by Justices Jackson and Murphy, as Solicitor and Attorney General, respectively), where Mr. Justice Roberts, at pages 34-35, said:

"Only in the event an alleged alien asserts his United States citizenship in the hearing before the Department and supports it by substantial evidence, is he entitled to a trial *de novo* in the district court. *United States* v. *Sing Tuck*, 194 U. S. 191, * * *."

Another rather recent case referring to the *Sing Tuck* case and "highlighting" its statement that, where the issue is merely one of *law*, *not* of *fact*, administrative appeal procedures need *not* first be exhausted before resorting to habeas corpus, is *United States* v. *Watkins*, 163 F. 2d 382 (1947), where Judge Swan, at page 330, in *reversing* an order dismissing the writ, said:

"In *United States* v. *Sing Tuck*, 194 U. S. 161, * * *, a Chinese, who claimed to be a United States citizen sued out a writ of habeas corpus without having appealed to the Secretary of Commerce and Labor from the administrative order of exclusion. The writ was dismissed on the ground that the relator had not exhausted his administrative remedy; and Justice Holmes said of the *Gonzales* case, '*there was no use in delaying the issuance of the writ until an appeal had been taken because there was no dispute about the facts, but merely a question of law.' The undisputed facts raise*

> *a question of law as to whether the relator was an alien immigrant. If that question is answered in his favor, his failure to take an appeal to the Attorney General should not be fatal to his claim.*" (Emphasis added.)

In this connection, it should be noted that in the case at bar (*Giese* v. *Chamberlin*) there is *no* real issue of *fact* to be determined by the Judge Advocate General on a motion for a new trial under A. W. 53, but only a question of *law*, viz: the *effect* of Giese's 1946 honorable discharge

> "from the military service of the United States" "for the convenience of the Government" "under R. R. 1-1" the "point system."

Hence, *even* had this case *not* involved the trial of a *civilian* by a court-martial having *no jurisdiction* over his *person* (which this case *does*), **in the words of Justice Holmes, there would here still be**

> **"no use in delaying the execution of the writ because there is no dispute about the facts, but merely a question of law."**

As we have indicated **the distinction between cases involving on original lack of jurisdiction over the person of the accused, on the one hand, and other grounds for resorting to habeas corpus, on the other hand, is peculiarly forceful and clean-cut in the case of a civilian tried by a court-martial; and the cases uniformly hold that such an individual, over whom such a tribunal has no personal jurisdiction, may be freed on a writ of habeas corpus without first exhausting any so-called "administrative review procedures."**

This is probably greatly influenced by the Fourth Amendment to the Constitution of the United States, which, in pertinent part, provides that:

> "No person shall be held to answer for a *capital*, or other infamous crime, unless on a presentment or in-

dictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; * * *."

Since, by A W 58 (10 U. S. C. 1530), desertion, "in time of war", is expressly punishable by "*death* or such other punishment as a court-martial may direct", it is obviously a "*capital*" crime and as such is within the purview of the said IVth Amendment.

In *Ex parte Wilson*, 114 U. S. 417, 5 S. Ct. 935 (1885), in releasing the prisoner on a writ of habeas corpus, *without first requiring an appeal*, this Court said:

"* * * our judgment is that a crime punished by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the fifth amendment of the constitution; and that the *district court, in holding the petitioner to answer for such a crime*, and sentencing him to such imprisonment, *without indictment or presentment by a grand jury exceeded its jurisdiction*, and he is therefore entitled to be discharged." (Emphasis ours.)

In the early case of *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650 (1830) Mr. Chief Justice Marshall (in referring to the still earlier case of *Wise* v. *Withers*, 3 Cranch 330), at page 209, said that (in the *Wise* case):

"* * * This court reversed the judgment of the Circuit Court, because *a court-martial had no jurisdiction over a person not belonging to the militia*, and its sentence in such a case being *coram non judice*, furnishes no protection to the officer who executes it.

"This decision proves only that *a court-martial was considered as one of those courts of limited jurisdiction, whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record.* * * *" (Emphasis added.)

In *Duncan* v. *Kahanamoku*, 327 U. S. 304, 66 S. Ct. 606

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(1946), certain *civilians* had been tried by military tribunals in Hawaii after the attack on Pearl Harbor and had been convicted and imprisoned. In *reversing* a Circuit Court decision which would have remanded them to military custody, this Court, speaking through Mr. Justice Black, at pages 307, 322-323, said:

> "* * * Both of these cases thus involve the rights of *individuals* charged with crime and *not connected with the armed forces* to have their guilt or innocence determined in courts of law which provide established procedural safeguards, rather than by military tribunals which fail to afford many of those safeguards. * * *"
>
> * * * * *
>
> "Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. *Ex parte Quirin, supra,* 317 U. S. at page 19, 63 S. Ct. at page 6, 87 L. Ed. 3. *Our system of government is clearly the antithesis of total military rule.* * * *. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government.
>
> "*Military tribunals have no such standing.* For as this Court has said before: '* * * *the military should always be kept in subjection to the laws of the country* to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that *the law alone shall govern; and to it the military must always yield.*' *Dow* v. *Johnson,* 100 U. S. 158, 169, 25 L. Ed. 623. * * *." (Emphasis ours.)

It should also be recalled that in *United States, ex rel., Hirshberg* v. *Cooke,* 336 U. S*. 210, 69 S. Ct. 530 (1949), cited and discussed at length in our original petition (pp. 22-28) where an individual, who had been given an honorable discharge from the Navy one day and had reinlisted the next, had been tried and convicted by court-martial for an offense committed in the earlier enlistment, this Court *reversed* a lower court ruling discharging the writ,

without requiring him first to exhaust any naval "review procedures".

It should also be noted that in the *Drainer* case (65 F. Supp. 410, aff., 158 F. 2d 981), cited and discussed at length in our original petition (p. 18-20), which has often been cited with approval by other courts (id. pp. 20-28), where a Marine was given an honorable discharge and later was tried and convicted by court-martial for an offense under an *earlier* enlistment, the court *discharged* him on a writ of habeas corpus, *without requiring him first to exhaust any "administrative procedures".*

Each of the *three* other cases cited and discussed at length in our original petition (pp. 14-18, viz: *United States, ex rel. Sanantonio* v. *Warden*, 265 F. 787; *United States ex rel. Viscardi* v. *MacDonald*, 265 F. 695; and *Ex parte Wilson*, 33 F. 2d 215), involved an individual who had been in the service and had been discharged *before* his trial by court-martial and yet, in each of said cases, the petitioner was discharged, *without requiring him to exhaust any "administrative review procedures".* It should also be kept in mind that those courts recognized (in the said *Viscardi* case)

> "the possible dangers to personal liberty involved in the trial of a man in effect a civilian by a military court, at a time when the man is not lawfully in service and a part of the military forces";

and (in the *Wilson* case) that a

> "person so dropped has become by virtue of that fact a civilian, and as such may appeal to the civil court for relief from arrest and trial • • • by a court-martial."

We submit that, **as the result of the above cases, it is crystal clear that,** insofar as requiring a petitioner first to exhaust either "administrative", or "judicial", "review procedures" before resorting to habeas corpus is con-

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cerned, **a lack of original jurisdiction over the person of the accused is very different from other defects**; and that this is *particularly true* where, as in the case at bar, a *civilian* is tried by a court-martial, which is a tribunal of extremely *limited* jurisdiction. **These same cases also fully establish** our basic contention under this point, *viz.*: **that a civilian tried by a court-martial having no jurisdiction over his person, is entitled to his release on habeas corpus without having first exhausted any Army "administrative review procedures."**

At page 21, the respondents go on to contend that:

> "* * * It appears particularly inappropriate that, having submitted this issue to the military authorities, petitioner should now be entitled to grant of habeas corpus without exhausting the procedures which he has already sought to utilize. * * *"

If this is intended to be a disguised contention that a *civilian*, by submitting to trial by a court-martial, *may waive* its utter *lack* of *jurisdiction* over his *person*, it is absolutely *without* any foundation in law.

In the **first** place, the petitioner's "submission" to the court-martial and the subsequent action by General Chamberlin and the Board of Review was "involuntary" and such "review" under AW 47 and 50 are entirely automatic and the petitioner could not prevent them.

In the **second** place, in Op. JAG, 1880, at p. 211, it is said (emphasis ours):

> "*A civilian* brought to trial before a court-martial, *cannot*, by a plea of guilty or other form of legal assent, *confer jurisdiction upon the court*, where no jurisdiction exists in law. XXXIX, 500."

In *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876 (C. A. 8, 1929), the petitioner, who had been convicted of desertion by an army general court-martial, sought his release by way of habeas corpus on the ground that, since he had never law-

fully been inducted into the Army, he was a *civilian* and the court-martial had no jurisdiction over his *person.* The record of trial (p. 879) established that, during the court-martial, the accused's counsel, when asked by the President if he wished to put in a plea to its jurisdiction over the person of the accused, expressly stated that he did *not* and that he *waived* any such possible plea.

In *reversing* a trial court order *dismissing* the writ, the Court of Appeals, at pages 879, 880, 881-882, said:

> "*We do not think that the jurisdiction of the court-martial could be waived by petitioner if he had not been lawfully drafted into the military service. The Second Article of War (10 USCA § 1473) defines persons subject to military law. The subject-matter is limited. It does not include persons not in military service.* There are exceptions, not here pertinent.
>
> • • • • •
>
> "In 22 Ops. Attys. Gen. 137, it was held that consent of the accused could not confer jurisdiction on a court-martial not possessing it by virtue of statutory authority.
>
> "The question remains whether the court-martial, whose judgment is attacked in the present proceeding, had jurisdiction to try petitioner as a deserter.
>
> "*A 'court-martial' is a tribunal of special and limited jurisdiction. Its judgments are open to collateral attack so far as questions relating to jurisdiction are concerned. McClaughry* v. *Deming,* 186 U. S. 49, 22 S. Ct. 786, 46 L. Ed. 1049; *Givens* v. *Zerbst,* 255 U. S. 11, 41 S. Ct. 227, 65 L. Ed. 475; *Collins* v. *McDonald,* 258 U. S. 416, 42 S. Ct. 326, 66 L. Ed. 692.
>
> "In the *McClaughry Case,* 186 U. S. 63, 22 S. Ct. 786, 791, 46 L. Ed. 1049, the Court quoted with approval the following from *Runkle* v. *United States,* 122 U. S. 543, 555, 7 S. Ct. 1141, 30 L. Ed. 1167:
>
> > '*A court-martial* organized under the laws of the United States *is a court of special and limited jurisdiction.* It is called into existence for a special purpose and to perform a particular duty.

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When the object of its creation has been accomplished, it is dissolved. 3 Greenl. Ev. § 470; *Brooks* v. *Adams*, 11 Pick. (Mass.) 441, 442; *Mills* v. *Martin*, 19 Johns (N. Y.) 7, 30; *Duffield* v. *Smith*, 3 Serg. & R. (Pa.) 590, 499. Such, also, is the effect of the decision of this court in *Wise* v. *Withers*, 3 Cranch. 331, 2 L. Ed. 457, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, 209, 7 L. Ed. 650, 655, ranked a court-martial as "*one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.*" To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. *Dynes* v. *Hoover*, 20 How. 65, 80, 15 L. Ed. 844; *Mills* v. *Martin*, 19 Johns. (N. Y.) 33. There are no presumptions in its favor, so far as these matters are concerned.'

"*The burden is upon the party asserting the validity of the judgment of the court-martial to prove the existence of the necessary jurisdictional facts.* In *Givens* v. *Zerbst*, *supra*, 255 U. S. page 19, 41 S. Ct. 227, 229, 65 L. Ed. 475, the court said: '* * * In consequence of the limited nature of the power of such courts the right to have exerted their jurisdiction, when called in question by collateral attack, will be held not to have existed unless it appears that the grounds which were necessary to justify the exertion of the assailed authority existed at the time of its exertion and therefore were or should have been a part of the record.' These jurisdictional facts may appear on the face of the court-martial record, or they may be shown by extrinsic evidence when the collateral attack is made.

"*In the case at bar, among the jurisdictional facts necessary to appear was that the court-martial had jurisdiction of the subject-matter. In other words, that the accused had the status prescribed by the Second Article of War* (U. S. Comp. Stat. § 2308, now 10 USCA § 1473). * * *

> *"We therefore hold that petitioner was never lawfully inducted into the military service; that the court-martial had no jurisdiction to try him as a deserter; that its judgment was void; that the District Court erred in not granting the writ of habeas corpus and discharging the petitioner.* The order of the District Court is accordingly reversed, with directions to grant the writ of habeas corpus and discharge the petitioner." (Emphasis added.)

The *balance* of the respondents' argument under this issue (pp. 11-23) relates only to whether or not the "administrative review procedures" available to Army personnel (which does *not* include Giese as an honorably discharged veteran) have in fact "been exhausted".

While we personally suspect that the so-called "application for a new trial" to the Judge Advocate General under AW 53 is actually, in the language of this Court in *Levers* v. *Anderson*, 326 U. S. 219,

> "in its effect so much like the normal, formal type of a motion for a new trial that we cannot read into the Act an intention to make it a prerequisite to * * * judicial review",

we bow to the contrary ruling of this Court in *Gusick* v. *Schilder*, 340 U. S. 128, insofar as persons *still on active duty* in the Army at the time of their trial and conviction by court-martial *are concerned*, and *where* (as *there* but *not here*) a question of *fact*, *not* merely of *law*, is involved.

We do, however, *doubt* the soundness of the respondents' repeated statements (pp. 6, 12, 20, 21) to the effect that

> "under A. W. 51(a) (10 U. S. C. Supp. IV, 1523(a), the Commanding General has 'the power to mitigate, remit or suspend the whole or any part' of the sentence. Thus General Chamberlin may suspend or remit entirely the sentence of imprisonment."

In this connection, it should be noted

(1) That, some five months after the court-martial

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had sentenced the petitioner to dishonorable discharge, total forfeitures and three years confinement at hard labor (R. 7), General Chamberlin "approved" the sentence but reduced the period of confinement to ten months and mitigated the "dishonorable" discharge to a "bad conduct" discharge (R. 7);

(2) That, having "published" such sentence as so "reduced" and "mitigated," under Army law, he lost the power thereafter to "commute" or further "mitigate" such an "approved" sentence;"[17]

(3) That said A. W. 51 gives the powers "to mitigate, remit or suspend the whole or any part thereof" only to "the President, the Secretary of the Department of the Army and any reviewing authority;"

(4) That, on October 30, 1950, the Army's Board of Review held the record of the petitioner's trial "legally sufficient to support the finding of guilty and the sentence"; and

(5) That the Judge Advocate General, on October 31, 1950, merely gave General Chamberlin "authority to *execute* the sentence" (Respondents' Brief, p. 47).

We also submit that where, as here, a court-martial tries and convicts a *civilian*, over whose *person* it had *no jurisdiction*, and sentences him to confinement at hard labor, total forfeitures and (as mitigated) a "bad conduct

17. In Op., JAG, 1880, pp. 438-439, it is said (emphasis ours): "8. Action taken by a reviewing officer upon the proceedings and sentence of a court-martial may be recalled and modified *before* it is published and the party to be affected is duly notified of the same. *After* such notice the action is *beyond* recall. The power of *remission* indeed may be exercised so long as any part of the punishment imposed remains unexecuted. (See ONE HUNDRED AND TWELFTH ARTICLE § 4.) *But when the final approval of the sentence* (or other action taken), *has been once officially communicated to the accused, the function and authority of the reviewing authority as such over and respecting the same is exhausted and cannot be revived.* An approval cannot then be substituted for a disapproval, or *vice versa, nor can an approved punishment be mitigated or commuted.* VIII, 556; XXVII, 377; XXXI, 15."

discharge"; where, as here, the "convening authority" (General Chamberlin) takes some five months even to review the sentence (while the petitioner remained in confinement, away from his wife, daughter and grandchild); where, as here, the Board of Review takes some one and one-half years to "hold" that the record "is legally sufficient to support the finding and the sentence"; and where, as here, the Government has the audacity to contend that, since General Chamberlin has not as yet ordered the sentence "executed," release by way of habeas corpus cannot be had,—

it would seem that the case at bar is also an excellent example of a situation where, as the respondents themselves say (pp. 13, 14):

> "*the federal courts are shocked by a deprivation of liberty without legal sanction so that the immediate freedom of the petitioner appears more important than permitting the erring courts to correct their own mistakes,*"

and where

> "the action of the military authorities would appear so arbitrary and without sanction of law that the civil courts would conclude that to continue the imprisonment pending military review would be so unreasonable as to justify the immediate release of the prisoner. * * *."

In view of the foregoing considerations, we submit that by virtue of his *civilian* status following his 1946 discharge

"from the military service of the United States," the petitioner was *not* required to exhaust such "administrative review procedures" as may be available to *military* personnel under the Articles of War before resorting to habeas corpus.

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Conclusion.

We therefore pray that the said judgment of the United States Court of Appeals for the Seventh Circuit be reversed in its entirety or be reversed and remanded with appropriate directions.

Respectfully submitted,

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